DATIN AZIZAH ABDUL GHANI

v.

DEWAN BANDARAYA KUALA LUMPUR & ORS. & ANOTHER APPEAL

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
GUNN CHIT TUAN SCJ
EUSOFF CHIN SCJ
[CIVIL APPEAL NOS. 02-169-1992 & 02-120/92]
24 JULY 1992

LOCAL GOVERNMENT: *Town planning - Appeals against planning orders granted by the Datuk Bandar - Appellants were landowners adjoining to properties which had received planning permission - Whether as adjoining owners, appellants have a right to be notified by the Datuk Bandar of Kuala Lumpur to object before the Datuk Bandar makes a development order under s. 22 of the Federal Territory (Planning) Act 1982 - Whether rr. 5, 6 and 11 of the Planning (Development) Rules 1970 which allows right of appeal by adjoining landowners is inconsistent with or saved by the Federal Territory (Planning) Act 1982 - Whether Datuk Bandar had exercised his powers unlawfully.*

CIVIL PROCEDURE: *Service - Whether a wrongly addressed letter never received by the affected adjoining land owner was deemed to have been duly served on the person if it was sent to the person by registered post under s. 53(1)(c)(ii) of Federal (Planning) Act 1982.*

The appellants in both the Civil Appeals No. 02-169-1992 and 02-170 of 1992 were aggrieved landowners who challenged the decisions of the Datuk Bandar of Kuala Lumpur in approving the development orders which permitted the construction of several apartment blocks on adjoining lands to their property.

In the first appeal, the appellant who was the owner of land Lot 4948 which adjoins Lot 4951 Persiaran Bukit Tunku, Mukim Batu, Kuala Lumpur had argued that the Datuk Bandar had not complied with the requirements of law when he made the development order dated 10 January 1991 granting the planning permission on Lot 4931.

The letter dated 25 October 1990 sent by the Planning Department of the Dewan Bandaraya Kuala Lumpur (DBKL) inviting the appellant to make objections (if any) under r. 5(2) of the Planning (Development) Rules 1970 ("the 1970 Rules") in respect of the development order on Lot 4951 dated 10 October 1991 never reached her as it was wrongly addressed.

The appellants argued that the Datuk Bandar was required under s. 22(4) of the Federal Territory (Planning) Act 1982 (the 1982 Act) to take into account "any other material consideration," and the adjoining landowners views and objections are "material consideration."

Relying on s. 53(1)(c)(iii) of the 1982 Act, the respondents argued that any document required to be served on any person under the Act or rules made under the Act is deemed to have been duly served on the person if it is sent to the person by registered post.

In Civil Appeal No. 02-170-1992, the appellant who as the owner of land Lot 37719, which adjoins Lots 6271 and 6272 argued that the development order dated 8 August 1990 in respect of Lots 6271 and 6272 did not satisfy the requirements of s. 22(4) of the 1982 Act. The respondents agreed that no notice was given to the appellant to enable him to make objections.

The respondents argued that rr. 5 and 6 of the 1970 Rules were inconsistent with the 1982 Act because s. 22 of the 1982 Act made no provisions on the need to inform the adjoining owners as were found under s. 16(3) of the Emergency (Essential Provisions) Ordinance of 1970 or s. 17(3) of the City of Kuala Lumpur (Planning Act) 1973 (the 1973 Act).

The 1970 Rules were made under powers conferred by s. 47 of Emergency (Essential Provisions) Ordinance No. 46 of 1970. The 1973 Act repealed Emergency (Essential Ordinance) No. 46 of 1970 but by virtue of the saving provisions s. 48 of the 1973 Act retained the rules made by the Emergency Ordinance unless it was inconsistent with the 1973 Act. The 1973 Act itself was repealed by s. 65(1) of the 1982 Act but by virtue of the saving clause s. 65(2)(a), those rules that were not inconsistent with the 1982 Act continued in force.

The following issues were raised for determination by the appellate Court:

(i) whether rr. 5, 6 and 11 of the Planning (Development) Rules 1970 (the 1970 Rules) are saved by the Federal Territory (Planning) Act 1982 (the 1982 Act);

(ii) if so, whether they are inconsistent with the 1982 Act;

(iii) if they are not saved by the 1982 Act, whether the adjoining owners have a right to be notified by the Datuk Bandar of Kuala Lumpur to put in their objections before the Datuk Bandar makes a development order under s. 22 of the 1982 Act.

Held:

[1] Section 65(2) of the 1982 Act saves rr. 5 and 6 of the 1970 Rules because those rules were not inconsistent with the provisions of s. 22(4) of the 1982 Act. However r. 11 of the 1970 Rules was inconsistent with s. 23(1) of the 1982 Act as s. 23(1) provides the right of appeal to the applicant for planning permission whereas r. 11 of the 1970 Rules allows such rights to adjoining landowners to appeal against any development order made by Datuk Bandar. Rule 11 is valid only to the extent it was not inconsistent with the 1982 Act, as provided by ss. 23 and 87 of the Interpretation Acts 1948 and 1967 (Act 388). As such issue No. 3 did not arise.

[2] (a) As the appellants in Civil Appeal 02-169-1992 did not receive the letter dated 25 October 1990 at all inviting her to make objections to the development order in respect of Lot 4951 dated 10 January 1990, the Datuk Bandar had failed to comply with the requirements of rr. 5 and 6 of the 1970 Rules. For s. 53(1)(c)(ii) presumption of the 1982 Act to apply the letter should have been addressed correctly to the appellant. It was addressed wrongly due to the negligence of the relevant officer thereby depriving the appellants of the opportunity to object.

(b) As the appellant in Civil Appeal No. 02-170-1992 did not at all receive the notice inviting him to object to the development order dated 8 August 1990 with respect to Lots 6271 and 6272, a fact which was agreed by the respondents, the Datuk Bandar had failed to comply with the rr. 5 and 6 of the 1970 Rules.

[3] Both appeals were allowed with costs in the Supreme Court as well in the High Court. The other orders made were:

(a) writ of *certiorari* issued to quash the development orders dated 10 January 1991 and 8 August 1990.

(b) The Datuk Bandar to reconsider the applications for planning permissions in respect of Lots 4951, 6271 and 6272 in accordance with the law.

(c) The deposits in respect of these appeals be returned to the appellants.

[Appeals allowed with costs in the Supreme Court and High Court.]

[**Bahasa Malaysia Translation** of Headnote]

KERAJAAN TEMPATAN: *Perancangan bandar - Rayuan-rayuan terhadap perintah pembangunan yang diberikan oleh Datuk Bandar - Pihak perayu merupakan tuan punya tanah yang bersebelahan dengan harta tanah yang telah menerima kebenaran pembangunan - Sama ada sebagai tuan punya tanah yang bersebelahan perayu mempunyai hak untuk diberitahu oleh Datuk Bandar Kuala Lumpur bagi tujuan membuat bantahan sebelum Datuk Bandar mengeluarkan suatu perintah pembangunan di bawah s. 22 Akta (Perancangan) Wilayah Persekutuan 1982 - Sama ada kaedah-kaedah 5, 6 dan 11 Kaedah-kaedah Perancangan (Pembangunan) 1970 yang memberikan hak untuk merayu oleh tuan punya tanah yang bersebelahan berlawanan dengan atau dikecualikan oleh Akta (Perancangan) Wilayah Persekutuan 1982 - Sama ada Datuk Bandar menggunakan kuasanya mengikut kehendak undang-undang.*

PROSEDUR SIVIL: *Penyampaian - Sama ada di bawah s. 53(1)(c)(ii) Akta (Perancangan) Wilayah Persekutuan 1982 surat yang tersalah dialamatkan dan tidak diterima langsung oleh tuan punya tanah yang terkilan itu boleh disifatkan sebagai disampaikan dengan sempurnanya kepada orang tersebut sekiranya surat itu telah dikirimkan melalui pos berdaftar.*

Pihak perayu dalam kedua-dua Rayuan Sivil No. 02-169-1992 dan 02-170 tahun 1992 yang merupakan tuan punya tanah yang terkilan menentang keputusan Datuk Bandar Kuala Lumpur meluluskan perintah-perintah pembangunan yang membenarkan pembinaan beberapa blok apartmen di atas tanah-tanah yang bersebelahan dengan harta tanah mereka.

Dalam rayuan pertama, perayu yang merupakan tuan punya tanah Lot 4948 yang bersebelahan dengan Lot 4951 Persiaran Bukit Tunku, Mukim Batu, Kuala Lumpur telah menghujahkan bahawa Datuk Bandar tidak mematuhi kehendak-kehendak undang-undang apabila beliau mengeluarkan perintah pembangunan bertarikh 10 Januari 1991 yang memberikan kebenaran perancangan ke atas Lot 4931.

Surat bertarikh 25 Oktober 1990 yang dikirimkan oleh Jabatan Perancangan Dewan Bandaraya Kuala Lumpur (DBKL) yang mempelawa perayu membuat bantahan (sekiranya ada) di bawah peraturan 5(2) Kaedah-kaedah Perancangan (Pembangunan) 1970 (Kaedah-kaedah 1970) berhubung dengan perintah pembangunan ke atas Lot 4951 bertarikh 10 Oktober 1991 tidak sampai langsung kepadanya kerana ia telah tersalah dialamatkan.

Pihak perayu menghujahkan bahawa Datuk Bandar dikehendaki di bawah s. 22(4) Akta (Perancangan) Wilayah Persekutuan 1982 (Akta 1982) mengambilkira "apa-apa pertimbangan matan yang lain" dan pandangan serta bantahan tuan punya tanah bersebelahan adalah "pertimbangan matan."

Responden-responden yang bergantung kepada s. 53(1)(c)(iii) Akta 1982, menghujahkan bahawa sebarang dokumen yang dikehendaki disampaikan kepada seorang di bawah Akta atau peraturan-peraturan yang dibuat di bawah Akta tersebut adalah disifatkan sebagai telah disampaikan dengan sempurnanya kepada orang itu sekiranya ia dihantar kepada orang tersebut melalui pos berdaftar.

Dalam Rayuan Sivil No. 02-170-1992, perayu yang merupakan tuan punya tanah Lot 37719, yang bersebelahan dengan Lot-lot 6271 dan 6272 menghujahkan bahawa perintah pembangunan bertarikh 8 Ogos 1990 berhubung dengan Lot-lot 6271 dan 6272 tidak memenuhi kehendak-kehendak s. 22(4) Akta 1982. Pihak responden bersetuju bahawa tiada notis yang diberikan kepada perayu untuk membolehkannya membuat bantahan.

Pihak responden menghujahkan bahawa kaedah-kaedah 5 dan 6, kaedah-kaedah 1970 adalah bertentangan dengan Akta 1982 kerana s. 22 Akta 1982 tidak mempunyai sebarang peruntukan mengenai keperluan untuk memaklumkan tuan punya tanah bersebelahan sebagaimana terdapat di bawah Akta 1973.

Kaedah-kaedah 1970 dibuat di bawah s. 47 Ordinan Darurat (Kuasa-kuasa Perlu) No. 46 Tahun 1970. Akta 1973 telah memansuhkan Ordinan Darurat (Kuasa-kuasa Perlu) No. 46 Tahun 1970. Walaupun begitu s. 48 Akta 1973 telah mengekalkan peraturan-peraturan yang tidak bercanggah atau bertentangan dengan Akta 1973. Akta 1973 itu sendiri telah dimansuhkan oleh s. 65(1) Akta 1982 akan tetapi melalui s. 65(2)(a) peruntukan-peruntukan yang tidak bercanggah dengan Akta 1982 terus berkuatkuasa.

Isu-isu berikut telah dibangkitkan untuk diputuskan oleh Mahkamah Rayuan:

(i) sama ada kaedah-kaedah 5, 6 dan 11, kaedah-kaedah Perancangan (Pembangunan) 1970 diselamatkan oleh Akta (Perancangan) Wilayah Persekutuan 1982",

(ii) Jika diselamatkan sama ada ia bertentangan dengan Akta 1982;

(iii) Jika sekiranya ia tidak diselamatkan oleh Akta 1982, sama ada tuan punya tanah bersebelahan mempunyai hak untuk diberitahu oleh Datuk Bandar Kuala Lumpur untuk mengemukakan bantahan mereka sebelum Datuk Bandar membuat suatu perintah pembangunan di bawah s. 22 Akta 1982, tersebut.

Diputuskan:

[1] Seksyen 65(2) Akta 1982 menyelamatkan kaedah-kaedah 5 dan 6 kaedah-kaedah 1970 kerana kaedah-kaedah ini tidak bertentangan dengan peruntukan s. 22(4) Akta 1982. Akan tetapi kaedah 11 adalah bertentangan dengan s. 23(1) oleh kerana s. 23(1) hanya memperuntukan hak untuk merayu kepada pemohon kebenaran perancangan sahaja, manakala Kaedah 11 memberikan hak sedemikian kepada tuan punya tanah bersebelahan merayu terhadap perintah pembangunan yang dibuat oleh Datuk Bandar. Kaedah 11 hanya sah setakat mana ianya tidak bertentangan dengan peruntukan-peruntukan Akta 1982, sepertimana diperturunkan dalam ss. 23 dan 87 Akta Pentafsiran 1948 dan 1967 (Akta 388). Oleh yang demikian isu No. 3 tidak bangkit.

[2] (a) Memandangkan pihak perayu dalam Rayuan Sivil No. 02-169-1992 tidak langsung menerima surat bertarikh 25 Oktober 1990 yang mempelawa beliau membuat bantahan terhadap perintah pembangunan berhubung dengan Lot 4951 bertarikh 10 Januari 1990, maka Datuk Bandar telah gagal untuk mematuhi kehendak-kehendak kaedah-kaedah 5 dan 6. Anggapan di bawah Akta 1982 hanya boleh digunakan sekiranya surat tersebut dialamatkan dengan betul kepada perayu. Ianya telah disalah alamatkan akibat kecuaian pegawai yang berkenaan dan dengan itu menidakkan peluang perayu untuk membuat bantahan.

(b) Memandangkan perayu dalam Rayuan Sivil No. 02-170-1992 tidak pernah menerima notis yang mempelawa beliau untuk membuat bantahan terhadap perintah pembangunan bertarikh 8 Ogos 1990 berhubung dengan Lot-lot 6271 dan 6272, suatu fakta yang dipersetujui oleh pihak responden, Datuk Bandar telah gagal untuk mematuhi kaedah-kaedah 5 dan 6.

[3] Kedua-dua rayuan telah dibenarkan dengan kos dalam Mahkamah Agung dan juga dalam Mahkamah Tinggi. Lain-lain perintah yang dibuat adalah:

(a) writ *certiorari* dikeluarkan untuk membatalkan perintah-perintah pembangunan bertarikh 10 Januari 1991 dan 8 Ogos 1990.

(b) Datuk Bandar hendaklah mempertimbangkan semula permohonan untuk kebenaran perancangan berhubung dengan Lot-lot 4951, 6271 dan 6272 mengikut lunas-lunas undang-undang.

(c) Deposit-deposit berhubung dengan rayuan-rayuan ini hendaklah dikembalikan kepada perayu-perayu.

[Rayuan-rayuan dibenarkan dengan kos dalam Mahkamah Agung dan Mahkamah Tinggi.]

Cases referred to:
Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. [1948] 1 KB 223 ***(foll)***
Padfield and Ors. v. Minister of Agriculture Fisheries and Food and Ors. [1968] 1 All ER 694 ***(foll)***

Legislation referred to:
City of Kuala Lumpur (Planning) Act 1973, ss. 17(3), 48
Emergency (Essential Powers) Ordinance No. 46, 1970, ss. 16(3), 47
Federal Territory (Planning) Act 1982, ss. 22, (4), 23(1), 53(1)(c)(ii), 64(1), 65(1), (2)(a)
Interpretation Acts 1948 and 1967, ss. 23, 87
Planning (Development) Rules 1970, rr. 5, 6, 11

Civil Appeal No. 02-169-1992
For the appellant - Cecil Abraham (R.S. Nathan with him); M/s. Shearn Delamore & Co.
For 1st & 2nd respondents - Zaki Tun Azmi; M/s. Rashid & Lee
For 3rd & 4th respondents - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.

Civil Appeal No: 02-170-1992
For the appellant - Cecil Abraham (R.S. Nathan & Manjit Singh Saini with him); M/s. Adlan & Hj. Suhaimi
For 1st & 2nd respondent - C.V. Das (N. Balan with him); M/s. Shook Lin & Bok
For developer - R.R. Sethu; M/s. R.R. Sethu

[**Editorial Note:** In Civil Appeal No. 02-120/92, the parties were *Datuk Hj. Suhaimi bin Dato Hj. Kamaruddin v. Dewan Bandaraya & 3 Ors.*]

JUDGMENT

Abdul Hamid Omar LP:

These two appeals were heard together because they raise virtually the same issues namely:

(i) whether rr. 5, 6 and 11 of the Planning (Development) Rules 1970, (hereinafter, the 1970 Rules) are saved by the Federal Territory (Planning) Act 1982, (hereinafter, the 1982 Act);

(ii) if so, whether they are inconsistent with the 1982 Act;

(iii) if they are not saved by the 1982 Act, whether the adjoining owners have a right to be notified by the Datuk Bandar of Kuala Lumpur to put in their objections before the Datuk Bandar makes a development order under s. 22 of the 1982 Act.

The 1970 Rules were made by the Federal Capital Planning Authority with the approval of the Minister, in the exercise of the powers conferred under s. 47 of the Emergency (Essential Powers) Ordinance No. 46 of 1970.

The City of Kuala Lumpur (Planning) Act 1973 (hereinafter, the 1973 Act) repealed the Emergency (Essential Powers) Ordinance No. 46 of 1970, but by s. 48 of the 1973 Act, any rule made under the Emergency (Essential Powers) Ordinance No. 46 of 1970, continued in force unless it was inconsistent with the provisions of the 1973 Act.

The 1973 Act was subsequently repealed by s. 65(1) of the 1982 Act. Section 65(2)(a) of the 1982 Act states:

> 65(2) Notwithstanding the repeal of the law specified in subsection (1), which in this Act is referred to as the "repealed law":
>
> (a) any rule made under the repealed law shall in so far as it is not inconsistent with the provisions of this Act continue in force and have the like effect as if it had been made under this Act;

Section 16(3) of the Emergency (Essential Powers) Act No. 46 of 1970 stated:

> 16(3) Upon receipt of the application for planning permission the Authority shall inform the registered proprietors of the lands adjoining the land to which the application relates of their right to object to the application and to state their grounds of objection within fourteen days of the date of the notice.

Section 17(3) of the 1973 Act stated:

> 17(3) Upon receipt of the application for planning permission the Commissioner shall by notice in writing served on the owners of the lands adjoining the land to which the application relates inform them of their rights to object to the application and to state their grounds of objection within fourteen days of the date of service of the notice:
>
> Provided that the Commissioner shall not be required to comply with the provisions of this subsection:
>
> (a) where in respect of an application for planning permission a layout plan is required by virtue of s. 7 and such layout plan is published for public objection pursuant to subsection (4) of that section; or
>
> (b) where an application for planning permission is in conformity with the development plan.

The 1982 Act contains no such provisions as were found in s. 16(3) or s. l7(3) quoted above. Instead, s. 22(4) of the 1982 Act states:

> 22(4) The Commissioner in dealing with an application for planning permission shall **take into consideration such matters as are** in his discretion **expedient or necessary for purposes of proper planning** and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to:
>
> (a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and
>
> (b) any other material consideration:
>
> [emphasis added]

It is noted that no rules were made under both the 1973 Act and the 1982 Act. Therefore, by s. 48 of the 1973 Act, and s. 65 of the 1982 Act, the rules made under the Emergency (Essential) Powers Ordinance No. 46 of 1970 should still continue to be in force. In order to determine the issue it is necessary to refer to rr. 5 and 6 of the 1970 Rules, and they are:

> 5(1) Upon receipt of any application for planning permission, the Authority shall send to the applicant an acknowledgment thereof.
>
> (2) Upon receipt of any application for planning permission, the Authority **shall inform the registered proprietors of the lands adjoining the land to which the application relates** in Form 4 of the First Schedule of their right to object to the application.

(3) Any registered proprietor of any land adjoining the land to which the application relates may object to the application within fourteen days of the date of the notification by the Authority.

(4) The Authority shall within fourteen days after the time specified to file objections hear the applicant, and those persons who have filed their objections.

6(1) The Authority shall if there are no objections to the application and if the application is in conformity with the comprehensive development plan, make a development order immediately after a lapse of fourteen days of the date of notice in Form 5 of the First Schedule.

(2) The Authority shall if there are objections to the application within two weeks after the hearing under r. 5(4) convey the decision to the applicant and those persons who had filed their objections.

(3) The development order in para. (l) and the decision in para. (2) shall be made in Form 5 of the First Schedule.

Datuk Zaki for the Datuk Bandar submitted that rr. 5 and 6 of the 1970 Rules are inconsistent with the 1982 Act because s. 22 of the 1982 Act makes no provision or is silent on the need to inform the adjoining owners as were found under s. 16(3) of the Emergency Essential Powers) Ordinance 46 of 1970, or s. 17(3) of the 1973 Act. Encik Cecil Abraham for the applicant in Appeal No. 02-169-1992 argued that the 1982 Act did not expressly prohibit the Datuk Bandar from inviting the views of the adjoining landowners when making a development order. He said that the Datuk Bandar is required under s. 22(4) of the 1982 Act to take into account 'any other material consideration', and the adjoining landowners views and objections are 'material consideration'. He, therefore, submitted that rr. 5 and 6 are not inconsistent with the provisions of s. 22 of the 1982 Act. He, however, conceded that r. 11 is inconsistent with the provision of s. 23(1) of the 1982 Act.

In our view it is a settled policy of the legislature that an Act of Parliament lays down the general principles of the law and to delegate to subordinate authorities the power of making rules for the purpose of settling administrative details and of providing the necessary procedures for giving effect to the general principles of the Act. When, therefore, an Act of Parliament enables an authority to make regulations, a regulation which is validly made under the Act, must be regarded as though it were itself an enactment. But any rule made under an Act of Parliament cannot be intended to override the specific provisions of the Act itself. Under ss. 23 and 87 of the Interpretation Acts 1948 and 1967, (Act 388), any rule which is inconsistent with an Act of Parliament is void to the extent of the inconsistency.

When the Emergency (Essential Powers) Ordinance No. 46 of 1970, was repealed the provisions of s. 16(3) of that Ordinance was re-enacted as s. 17(3) of the 1973 Act. These sections required the Datuk Bandar to give the right to the adjoining landowners to put in their objection whenever he received an application by a landowner to develop his land. The 1982 Act when repealing the 1973 Act did not reenact the provision of s. 17(3). Instead, it makes provision under s. 22(4) requiring the Datuk Bandar, when dealing with an application for planning permission, "... to take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning ..." and the Datuk Bandar "shall have regard to any other material consideration".

It will be seen that while under the repealed 1970 Ordinance and the repealed 1973 Act the Datuk Bandar was required to notify the adjoining landowners and hear their objections, the 1982 Act is silent on this issue. But the 1982 Act requires him, even though at his discretion,

to consider matters which are expedient or necessary and material for the purpose of proper planning. How the Datuk Bandar is to perform his statutory duty when he received an application for planning permission, if no provision is made in the 1982 Act, is to be provided for by the rules to be made under s. 64 of the 1982 Act. No rules under the said s. 64 has so far been made since the relevant provision, that is, s. 22 came into force on 15 April 1984. Section 64(1) of the 1982 Act states:

> 64(1) the Commissioner may with the approval of the Minister make rules generally for the **better** carrying out of the provisions of the Act.

We emphasise the word 'better' in s. 64 because this word is seldom used under rules-making power in most Acts of Parliament. It denotes improvements. We have already said that rules are generally made to lay down procedures, administrative or otherwise in carrying out the provisions of an Act. In the context of s. 64(1) of the 1982 Act, the word 'better' requires the rule making authorities to find and determine the best means and ways for the proper carrying out of the provisions of the Act.

We find that the existing rr. 5 and 6 of the 1970 Rules are not in conflict or inconsistent with the provision of s. 22(4) of the 1982 Act. They merely spell out one of the material and necessary matters which the Datuk Bandar is required to consider, and they lay down the procedures how the Datuk Bandar is to execute his statutory duties in considering such matters before coming to a decision to make or refuse to make a development order.

On the first two issues raised before us we find that s. 65(2) of the 1982 Act saves rr. 5 and 6 of the 1970 Rules because those rules are not inconsistent with the provision of s. 22(4) of the 1982 Act. Rule 11 of the 1970 Rules, however, requires further consideration. Rule 11 states:

> 11(1) Any applicant or any owner of the lands adjoining the land to which the application for development relates, and who has lodged an objection under para. (3) of r. 5, aggrieved by the development order may appeal to the appeal board within three months of the receipt by him of Form 5 of the First Schedule.
>
> (2) The appeal under para. (1) shall be made in Form 12 of the First Schedule and shall be accompanied by a fee of RM250.

But s. 23(1) of the 1982 Act states:

> 23(1) An appeal against the decision of the Commissioner made under subsection (1) or (2) of s. 22 may be made to the Appeal Board within one month from the date of communication of such decision to him, **by any applicant** aggrieved by the decision of the Commissioner in refusing his application for planning permission or who is aggrieved by any condition imposed by the Commissioner in granting the planning permission in respect of his application.

We find that r. 11 of the 1970 Rules is inconsistent with the provision of s. 23(1) of the 1982 Act. This is because while s. 23(1) of the 1982 Act gives only the applicant for planning permission the right to appeal r. 11 of the 1970 Rules allows even the adjoining landowners who had put in their objections to appeal against any development order made by the Datuk Bandar. This part of r. 11, therefore, militates against the provision of s. 23(1) of the 1982 Act. We, therefore, find that r. 11 of the 1970 Rules is valid only to the extent that it makes provision for an applicant to file his appeal in Form 12 of the First Schedule within 3 months after the receipt by him of Form 5.

Under the circumstances issue number 3 does not arise.

It is now necessary to examine the facts in Civil Appeal No. 02-169-1992 as found by the learned Judge of the High Court to determine whether the Datuk Bandar had complied with the requirements of the law when he made the development order dated 10 January 1991 granting planning permission on Lot 4951 allowing an increase in density from 10 persons to 44 persons per acre to enable the building of two blocks of apartment, one of two storeys and the other of three storeys high.

The appellant in this appeal is the owner of land Lot 4948 which adjoins Lot 4951 Persiaran Bukit Tunku, Mukim Batu, Kuala Lumpur. The appellant in her affidavit said that she had received an A.R. registered letter dated 15 September 1986, from the Planning Department of the Dewan Bandaraya Kuala Lumpur (DBKL) informing her that an application for developing Lot 4951 had been received by the DBKL for the construction of a 5 storey apartment, and she was asked if she had any objection to make under r. 5(2) of the 1970 Rules.

On 18 September 1986, she sent her objection giving reasons for her objection. On 5 February 1986, she received another letter from the DBKL to say that the Datuk Bandar had rejected the application for the planning permission.

The appellant said that in early 1991, she saw some demolition work being done on Lot 4951. Upon her inquiries made at DBKL she found that the Datuk Bandar had made a development order in respect of Lot 4951 on 10 January 1991. She also found from an officer in the Planning Department that a letter dated 25 December 1990 had been sent to her to inquire if she had any objection on the construction of two apartments of 2 and 3 storey respectively on the same Lot 4951. While the first letter dated 15 September 1986, was addressed to her at her residence at No. 8 Simpang Tunku, Kenny Hill, Kuala Lumpur, the second letter dated 25 October 1990 was addressed to her at No. 15 Lorong 17/21F Petaling Jaya which was a house she had let out to a tenant. Both letters bore the same DBKL file reference number. The letter dated 25 October 1990 never reached the appellant. She, therefore, could not file any objection to the Datuk Bandar.

Datuk Zaki, the learned Counsel for Datuk Bandar, said the error in the address of the appellant in the second letter dated 25 October 1990 was because two different officers had handled the file. In any event, he submitted that under s. 53(1)(c)(ii) of the 1982 Act any document required to be served on any person under the Act or rules made under the Act, is deemed to have been duly served on the person if it is sent to the person by registered post. With respect we do not agree that the presumption would apply in this case. For the presumption to apply the letter must first be correctly addressed to the appellant. The mistake in the address is due to the negligence of the officer who signed the letter dated 25 October 1990. This mistake had deprived the appellant of the opportunity of putting in her objection. It follows that when making the development order dated 10 January 1991, the Datuk Bandar had failed to comply with the requirement of rr. 5 and 6 of the 1970 Rules.

In Civil Appeal No. 02-170-1992, Datuk Hj. Suhaimi b. Dato Hj. Kamaruddin is the owner of land Lot 37719 Mukim of Wilayah Persekutuan, which adjoins Lots 6271 and 6272 belonging to Lindisfarne Heights Sdn. Bhd. On 8 August 1990, the Datuk Bandar Kuala Lumpur on application of Lindisfarne Heights Sdn. Bhd., made a development order and approved the population density of Lots 6271 and 6272 from 10 persons per acre to 82 persons per acre, and also approved the building of a three storey 5 levels condominium on those Lots Two adjoining landowners, Lot 6273 and Lot 6270 were given notices by the DBKL to make their objections but they did not make any objection. However, no notice was given by DBKL to Datuk Hj. Suhaimi as admitted by Mahadi bin Ngah an officer in the Planning Department of

DBKL in his affidavit affirmed on 21 March 1992. We therefore find that in this appeal too, the Datuk Bandar had failed to comply with the requirements of the provision of rr. 5 and 6 of the 1970 Rules.

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* [1948] 1 KB 223, at 228 Lord Green MR said:

> What then is the power of the Courts? They can only interfere with an act of executive authority if it can be shown that the authority has contravened the law ... As I have said, it must always be remembered that the Court is not a Court of Appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any Court of law. What then are those principles? They are well understood. They are principles which the Court looks to in considering any question of discretion of this kind.
>
> The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication **matters which the authority exercising the discretion ought to have regard to,** then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.
> (Emphasis added)

In *Padfield & Ors. v. Minister of Agricultre, Fisheries & Food & Ors.* [1968] 1 All ER 694 at 717 Lord Upjohn said:

> My lords, on the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied in this case. The Minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully.

We would therefore allow both the appeals with costs here and in the High Court.

In respect of both the appeals we also make the following orders:

(1) that *certiorari* be issued to quash the development order dated 10 January 1991 in respect of Lot 4951 Mukim Batu, Kuala Lumpur and development order dated 8 August 1990 in respect of Lots 6271 and 6272 Mukim of Wilayah Persekutuan made by the Datuk Bandar;

(2) that the Datuk Bandar, shall reconsider the applications for planning permissions in respect of Lot 4951 Mukim of Batu Kuala Lumpur and in respect of Lots 6271 and 6272 Mukim of Wilayah Persekutuan, in accordance with law; and

(3) the deposits in respect of these appeals be returned to the appellants.

Also found at [1992] 4 CLJ 2071